In the United States District Court for the Southern District of Ohio, Eastern Division

Ray A. Clark, et al., Plaintiffs, vs. The Ohio State Life Insurance Company, et al., Defendants.	Civil Action No. 5146

RESPONDENTS' APPENDIX

For the convenience of the Court, there are hereinafter set forth the Amended Complaint, Answer and Counter Claim, Reply, and Amendment of Answer that were filed in the District Court. These pleadings are set forth at pages 4a to 53a, inclusive, of the record filed in this Court by the petitioners. Certain typographical errors have been corrected to conform to the original documents.

AMENDED COMPLAINT

[Filed March 28, 1958.]

1. Plaintiffs are, and at the times of all transactions herein complained of were, mutual plan policyholders of The Columbus Mutual Life Insurance Company (herein called "Columbus Mutual"). Plaintiff, Ray A. Clark, is a citizen and resident of the State of Indiana. Plaintiff Ralph P. Lounsbury, is a citizen and resident of the State of New Jersey. Plaintiff, Dr. George Lister, is a citizen and resident of the State of Florida. Plaintiff, Leonard Rosenberg, is a citizen and resident of the State of

Maryland. Plaintiff, David A. Shepherd, is a citizen and resident of the State of Tennessee. Plaintiffs, Ray A. Clark and Leonard R. Rosenberg, are also stockholders of Columbus Mutual and they have opposed, resisted and voted against the actions of said company's stockholders and directors hereinafter complained of.

2. Plaintiffs bring this action on behalf of themselves, and on behalf of Columbus Mutual, and on behalf of all mutual plan policyholders of Columbus Mutual, who number approximately 160,000 persons and are so numerous as to make it impracticable to bring them all before this court. This action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. There is an actual justiciable controversy between the plaintiffs and the class they represent and the defendants with respect to all matters as to which a declaratory judgment is sought in this action.

3. Defendant, The Ohio State Life Insurance Company (herein called "Ohio State") is a stock insurance company organized in 1906 and existing under the laws of the State of Ohio, with its principal office in Columbus, Ohio. Defendant, Columbus Mutual, is an insurance company organized in 1906 under the insurance laws of the State of Ohio, with its principal office in Columbus, Ohio, which, at all times since its organization has written substantially all of its policies of life insurance on the mutual plan. Said defendants are citizens of the State of Ohio and are residents of the Southern District of Ohio.

4. The defendants, Allen G. Aigler and Robert H. Campbell are citizens of the State of Ohio and are residents of the Northern District of Ohio. All of the other defendants are citizens of the State of Ohio and are residents of the Southern District of Ohio.

5. On or about January 6, 1956, the defendant, Ohio State, purchased 4810 shares of Columbus Mutual's stock and, during the year 1956, purchased additional shares of such stock, so that on December 31, 1956, and ever since, Ohio State has owned 4,977 of the 5,000 issued and outstanding shares of Columbus Mutual's stock, to-wit, 99.54% thereof. On or about January 28, 1957, and again on January 27, 1958, Ohio State voted said shares to elect the directors of Columbus Mutual who then and now hold their offices. Ohio State has had and now has absolute control of Columbus Mutual and its directors, and Ohio State has voted its said stock of Columbus Mutual to accomplish the matters herein complained of. Plaintiffs, in person, by mail, and by counsel have complained of and objected to the matters herein complained of but to no avail. No demand has been made upon the directors of Columbus Mutual to bring this action for the reason that said directors, or a majority of them, are controlled by Ohio State and any such demand would, therefore, be futile.

6. The defendant, Frederick E. Jones, is president of Ohio State and Columbus Mutual, and is a director and stockholder of both companies. The defendant, Frank L. Barnes, is vice president of Ohio State and Columbus Mutual and is a director and stockholder of both companies. The defendant, I. Malcolm McCampbell, is vice president and actuary of Ohio State and is a director and stockholder of both companies. The defendants, Frank A. Burgess and Charles F. Bruny, are directors and stockholders of both companies. The defendant, Thomas F. Ross, is vice president, medical director, a director and a stockholder of Ohio State. The defendants, David C. Morgan and Howard W. Kraft, are vice presidents, directors and stockholders of Ohio State. The defendants, Darrol R. Johnson, Allen G. Aigler, Dr. Rees E. Tulloss, Stanton G. Prentiss, Carl E.

Steeb, Robert H. Campbell, Walter F. Eberle, Robert N. Lupfer and Edward A. Sauer are directors and stockholders of Ohio State. The defendants, Ben F. Hadley and Donald J. Hoskins, are vice presidents, directors and stockholders of Columbus Mutual, and, on belief, are also stockholders of Ohio State. The defendant, Danforth E. Ball, Jr., is treasurer of Columbus Mutual and is a director and stockholder of said company. The defendants, W. Lyman Case, Carl Mitcheltree, Donald C. Power and Jay Shaw, Sr., are directors and stockholders of Columbus Mutual.

7. This court has jurisdiction of this action because the matter in controversy exceeds the sum or value of $3000.00, exclusive of interest and costs, and because it arises under the Constitution of the United States, and because there is diversity of citizenship of the parties hereto.

8. Article V of the articles of incorporation of Columbus Mutual, in full force and effect at all times from November 17, 1906 to the present date, provides:

> "Fifth. Dividends may be declared and paid on the outstanding stock; provided that the total dividends declared or paid shall not exceed an amount computed at the rate of ten (10) per cent per annum on the par value of the stock from the date of original issue to the date of its retirement, and, provided further that no dividend will exceed an amount equal to ten (10) per cent per annum on the par value of the stock from the date of its original issue to the date of payment of dividend.
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> "Dividends on capital stock shall be paid from the surplus of the company, and the directors may pay off from such surplus and retire all of the issued and paid up capital stock at the price of two hundred dollars ($200.00) per share; and may from such surplus, when deemed advisable by the directors, return to the

holders of stock the amounts which may have been paid to the company by the stockholders over and above the par value of the stock subscribed and paid for by them respectively. Subject, however, to the payment of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, the surplus of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide.

"When all of said capital stock shall have been so retired and the amounts, if any, paid to the company by stockholders over and above the par value of the stock subscribed and paid for by them shall have been returned, said company shall be reorganized, reincorporated or converted, in any manner permitted by law, into a mutual company composed of the policyholders in this company. The subscriptions for such stock and the certificates of stock representing the same shall contain a provision whereby the subscriber to and holder of such stock shall agree and assent to the provisions of this charter."

9. By virtue of said provisions of said Article V of Columbus Mutual's articles of incorporation, the surplus of said company belongs to the holders of its policies on the mutual plan, that is, its mutual plan policyholders, who are hereinafter referred to as the "policyholders", subject only to the limited rights of Columbus Mutual's stockholders to receive dividends equal to 10% on the par value ($100.00) of their stock and to receive $200.00 per share for their stock upon its retirement. Plaintiffs, and the policyholders in whose behalf they bring this action, are legally the

owners of the surplus of Columbus Mutual and, as such, are the equitable and beneficial owners of said company. Ever since Ohio State purchased said 4,810 shares of Columbus Mutual's stock on or about January 6, 1956, Ohio State and the individual defendants have been taking actions and carrying on activities for the purpose and with the objective of taking Columbus Mutual's surplus away from its policyholders and causing said surplus to belong to its stockholders, and Ohio State and its directors, defendants herein, have been and are exercising Ohio State's absolute voting control of Columbus Mutual's stock so to do, as is more particularly hereinafter set forth.

10. The 5,000 authorized, issued and outstanding shares of the stock of Columbus Mutual have a par value of $100.00 per share. Ohio State paid $1,300.00 per share for the stock that it purchased, as aforesaid, and made said payment by expending $6,470,100.00 of Ohio State's surplus funds, which constituted more than five per cent of Ohio State's total admitted assets. But for the restrictions and limiations imposed by said Article V on the rights of Columbus Mutual's stockholders, plaintiffs believe and aver that said company's stock, as of about January 6, 1956, would have been reasonably worth approximately $5,000.00 or more per share and today would be reasonably worth approximately $6,000.00 or more per share. At the time Ohio State purchased Columbus Mutual's stock, it was the plan and program of Ohio State, its stockholders and directors to vote Columbus Mutual's stock so as to merge Columbus Mutual into Ohio State and thereby add the net worth of Columbus Mutual to the net worth of Ohio State, a result of which would have been to increase the reasonable worth of the stock of Ohio State, the company surviving the merger, by a substantial amount, which plaintiffs aver, on belief, would have been by about $200.00 per share for

each of Ohio State's 100,000 shares, that is by approximately $20,000,000.00.

11. When Ohio State filed its annual statement as of December 31, 1956, with the superintendent of insurance of the State of Ohio, as required by law, it valued the stock of Columbus Mutual then owned by it at $6,470,100.00, the amount for which it had been purchased at $1,300.00 per share. Thereafter, an examination of Ohio State was made by representatives of the insurance departments of the States of Ohio, Kentucky, Michigan, California and Pennsylvania. In their report of examination, said examiners reduced the valuation of Columbus Mutual's stock on the books of Ohio State, to $333.00 per share. This was done because The National Association of Insurance Commissioners, an association which determines the valuation at which life insurance companies may carry their investments on their books, had determined that the stock of Columbus Mutual should be carried on Ohio State's books at a valuation of $333.00 per share so long as the provisions of said Article V remained in effect. The effect of the foregoing has been to reduce the surplus of Ohio State by $4,805,990.00, which plaintiffs believe and aver has resulted in a like reduction in the value of Ohio State's stock.

12. At a meeting of Columbus Mutual's stockholders held on November 19, 1956, the controlling shares of said company owned by Ohio State were voted in favor of a resolution to amend Columbus Mutual's articles of incorporation, which resolution was then adopted and recited an intent "to eliminate all of the provisions and restrictions of" Article V of said articles and proposing that the "present free surplus" should be preserved "for the protection of policyholders". Plaintiff, Ray A. Clark, and other stockholders, and policyholders, in person, by mail, and subse-

quently through counsel, opposed said proposal and it was abandoned.

13. At a meeting of Columbus Mutual's stockholders held on February 25, 1957, the 99.54% of the shares of said company owned by Ohio State were voted in favor of a resolution to amend Columbus Mutual's articles of incorporation, which resolution was then adopted and provided, as follows:

"Whereas, The Ohio State Life Insurance Company, a legal reserve life insurance company, organized under the laws of Ohio, and doing business as a stock company, writing primarily participating policies, has acquired 97.7 per cent of the shares of The Columbus Mutual Life Insurance Company, a stock company, doing business on the mutual plan, and

"Whereas, it is the desire of the stockholders of both companies to merge The Columbus Mutual Life Insurance Company into The Ohio State Life Insurance Company, thus creating a single legal reserve life insurance company of almost double the number of policyholders and affording greater protection to all policyholders of both companies on account of almost double breadth of coverage, as well as more efficient and economical management, and

"Whereas, in order to effect such merger, it is necessary first to amend the Articles of Incorporation of The Columbus Mutual Life Insurance Company in order that it may prospectively conduct its business in conformity with the method of business of The Ohio State Life Insurance Company writing primarily participating insurance while fully protecting its present policyholders holding policies on the mutual plan, now, therefore,

"Be it resolved, That the Articles of Incorporation of The Columbus Mutual Life Insurance Company (as

amended) be and the same hereby are amended by the addition of the following paragraph at the end of the Fifth Article thereof:

"'It is provided however that the foregoing provisions of this Article shall have no application to that portion of the earnings or surplus attributable to policies issued after the effective date of this article.'

"Be it further resolved, that upon the filing of the foregoing amendment in the office of the Secretary of State and the approval thereof, the officers and directors of this company are directed to call a special stockholders' meeting for the purpose of taking all necessary steps as are required to effect su merger."

14. Shortly after February 25, 1957, defendants caused said proposed amendment to be filed with the Secretary of State of the State of Ohio, who submitted it to the Attorney General of Ohio for approval. Plaintiffs, Ray A. Clark, Leonard Rosenberg and Ralph R. Lounsbury, in person and through counsel, opposed said proposed amendment, and their counsel and counsel for said company filed briefs with the Attorney General of Ohio. In their reply brief, Columbus Mutual's attorneys, stating the position of the defendants herein, said to the Attorney General of Ohio:

"Far from being an attempt to deprive the policyholders of their rights, the proposed amendment seeks to protect those rights to an extent far greater than the law requires, for it is the company's position, and we believe it to be the law, that the policyholders have no right or title whatsoever even to the company's existing surplus save for the right to share in the divisible surplus at the end of each policy year *as apportioned by the company.*"

The Attorney General of Ohio did not certify to said proposed amendment, and, at a meeting of Columbus Mutual's stockholders held October 28, 1957, the resolution adopted on February 25, 1957, was rescinded.

15. Prior to October 28, 1957, Ohio State issued the following statement and requested that it be and it was set forth in said Report of Examination of The Ohio State Life Insurance Company as of December 31, 1956, made by representatives of the Insurance Departments of Ohio, Kentucky, Michigan, California and Pennsylvania, in which report it appears at page 44, as follows:

> "The purchase of ownership of the Columbus Mutual Life Insurance Company was authorized by the directors of the Ohio State Life Insurance Company with the thought of an eventual merger for the purpose of realizing the many advantages and economies arising out of combined operations.
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> "At the present time, Management is proceeding to amend Section 5 of the Charter of The Columbus Mutual Life Insurance Company to conform to the Charter of The Ohio State Life Insurance Company insofar as business written in the future is concerned. However, all business in force and rights of existing policyholders will not be disturbed as the amendment will effect only new business.
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> "After the proposed amendment is made, it is the intention of the Management of both companies to merge the two into one company, carrying Section 5 into the merger agreement and into the Charter of the new company for the continued and exclusive protection of the policyholders of the Columbus Mutual Life Insurance Company as their interests may appear under Section 5. Under these circumstances, it is quite apparent that complete ownership of The Columbus Mutual Life Insurance Company is far more than an investment in mere certificates of stocks. It must be evaluated from this investor's point of view according to the value received by this investor (Ohio State Life Insurance Company) which will be fully realized upon

merger of the two companies into the new Ohio State Life Insurance Company."

In accordance with their expressed intentions, as hereinbefore set forth, it is the plan and program of the defendants that the directors of Ohio State will vote said 99.54% of the shares of Columbus Mutual to accomplish the merger of said company in Ohio State Life and to incorporate the present proposed amendment of said Article V, hereinafter set forth, in the agreement of merger into which said companies will enter.

16. Said stockholders meeting of Columbus Mutual on October 28, 1957, was called by order of Ohio State as "a stockholder holding 4,977 shares out of a total of 5,000 shares of the voting stock" of Columbus Mutual, and by the defendant, Frederick E. Jones, as president of Columbus Mutual duly authorized by the unanimous vote of the executive committee of Columbus Mutual, all of whom are defendants herein. At said meeting said 4,977 shares of Columbus Mutual's stock owned by Ohio State were voted in favor of a resolution to amend Columbus Mutual's articles of incorporation, which resolution was adopted. Pursuant thereto, the defendant, Frank L. Barnes, and Orval J. Miller, as secretary of Columbus Mutual, on the same day, presented to the Secretary of State of the State of Ohio the following certificate of amendment:

"Certificate of Amendment,
to Articles of
The Columbus Mutual Life Insurance Company

Frank L. Barnes, first vice president, and Orval J. Miller, secretary, of The Columbus Mutual Life Insurance Company, an Ohio corporation with its principal

office located at 303 East Broad Street, Columbus, Ohio, do hereby certify that a meeting of the holders of the shares of said corporation entitling them to vote on the proposal to amend the articles of incorporation thereof, as contained in the following resolution, was duly called and held on the twenty-eighth day of October, 1957, at which meeting a quorum of such shareholders (and each class thereof) was present in person or by proxy, and that by the affirmative vote of the holders of shares entitling them to exercise 99.54% of the voting power of the corporation on such proposal the following resolution was adopted to amend the articles:

"Whereas, The Ohio State Life Insurance Company, a legal reserve life insurance company, organized under the laws of Ohio, has acquired 4,977 out of 5,000, or 99.54%, of the shares of The Columbus Mutual Life Insurance Company, both companies being stock companies writing policies primarily on the participating or mutual plan, and

"Whereas, The National Association of Insurance Commissioners, an association which determines the valuation at which life insurance companies may carry their investment in securities on their books, has determined that the stock of The Columbus Mutual Life Insurance Company may be caried on the books of The Ohio State Life Insurance Company at three hundred thirty three dollars ($333.00) per share so long as the provisions of Article V of the Articles of Incorporation of The Columbus Mutual Life Insurance Company remain in effect, and

"Whereas, the book value of the shares of stock of this company, as customarily computed for stock life

insurance companies and allowed by such association, is far in excess of three hundred thirty-three dollars ($333.00), and

"Whereas, it is being considered that the two companies may in the future merge, which would require that earnings of this company be handled in conformity with the methods employed by The Ohio State Life Insurance Company, while fully protecting its present participating policyholders, now, therefore,

"Be it resolved, that the Fifth Article of the Articles of Incorporation of The Columbus Mutual Life Insurance Company (as amended) be and the same hereby is amended to read as follows:

"Fifth. Unassigned surplus as of December 31, 1956, as shown on the annual statement filed with the Superintendent of Insurance of Ohio, to-wit: $10,739,205.07, shall be held and used as a special surplus for policyholders for protection of the holders of participating policies of the company which are in force on the effective date of this amendment, and no dividends to any stockholder of the company shall be payable therefrom.

"Annually for a period of twenty-five (25) years after the effective date of this amendment, there shall be added to said special surplus for policyholders, as then existing, from the earnings of the company a percentage of such then existing special surplus for policyholders equal to the net earned interest rate on the mean invested assets after all taxes based on income.

"Regular dividends shall be paid from the earnings of the company to all participating policyholders of the company without distinction. Additional divi-

dends may be paid out of such special surplus for policyholders, as the directors in their sole discretion may from time to time provide, only to the holders of participating policies of the company in force on the effective date of this amendment.

"In the event of dissolution and liquidation of the company at any time so long as any participating policies of the company in force on the effective date of this amendment are then in force, such policyholders shall be entitled to distribution from such special surplus for policyholders, as then existing, in amounts representing their percentage interest in such surplus at the time of the effective date of this amendment.

"At the maturity of the last participating policy of the company in force on the effective date of this amendment, the special surplus for policyholders, as then existing, shall be permanently held for the protection of all policyholders, and no dividends may at any time be declared to stockholders; except out of surplus over and above such amount.

"In witness whereof, said Frank L. Barnes, First Vice President, and Oryal J. Miller, Secretary, of The Columbus Mutual Life Insurance Company, acting for and on behalf of said corporation; have hereunto subscribed their names and caused the seal of said corporation to be hereunto affixed this twenty-eighth day of October, 1957.

By Frank L. Barnes,
First Vice President.
By Oryal J. Miller,
Secretary.

The Secretary of State submitted said certificate of amendment to the Attorney General of Ohio, who, on October 29, 1957, returned it to the Secretary of State endorsed, as follows:

"Approved: (See letter of transmittal and certification attached)
October 29, 1957
William Saxbe
Attorney General of Ohio."

In said "letter of transmittal and certificate attached", said Attorney General of Ohio said to said Secretary of State:

"You have submitted to me amendment to Articles of Incorporation of Columbus Mutual Life Insurance Co., dated October 28, 1957, for certification in accordance with Section 3907.03, Revised Code. After careful consideration I return said amendment to you with my approval endorsed thereon, with however the following observation:

"This company was incorporated under Ohio law in 1906, as a legal reserve stock life insurance company. The company in my opinion has a present legal right to amend its Articles of Incorporation being as it is a stock company, provided always that such amendment is not inconsistent with the constitution and laws of the United States and of this state.

"It is contended on behalf of some of the participating policyholders of this company that the amendment which you have submitted may not be recorded by you on the ground that it will deprive such policyholders of constitutional rights which they may have under the present charter of the company.

"Any decision reached by this office upon the complex questions raised by this amendment will not finally adjudicate the matter. It is recognized that the rights of some one hundred and fifty thousand policyholders are involved, which rights must and should in my judgment be finally determined by the Supreme Court.

"In view of those facts and in order that the rights of all parties affected may be finally so adjudicated

without delay, I have endorsed my approval upon the amendment and hereby certify the same as provided by such Section 3907.03, with, however, the advice to you that, as Secretary of State, you refuse to record such amendment and certificate.

"This course of procedure should enable the company to invoke the original jurisdiction of the Supreme Court, thus avoiding uncertainty and delay in the final determination of this matter. It is my opinion that facilitating and expediting this matter will best serve interests of the thousands of policyholders of this company, the shareholders, and the general public."

17. Said Secretary of State refused to record said certificate of amendment, and on November 4, 1957, the defendants caused Columbus Mutual to file, in the Supreme Court of Ohio, an original action in mandamus, being No. 35398, on the dockets of said court, wherein, the relator, Columbus Mutual, prayed for a peremptory writ of mandamus directing the Secretary of State to record said certificate together with the certificate of the Attorney General, in a book kept for that purpose.

18. The adoption of said proposed amendment on October 28, 1957, its submission to the Secretary of State, and the filing and prosecution of said original action in mandamus are parts of the plan and program of Ohio State and the individual defendants to deprive Columbus Mutual's policyholders of its surplus, which belongs to said policyholders, and constitute further steps in that plan and program of Ohio State and the individual defendants to cause said surplus to belong to Ohio State and its stockholders.

19. Plaintiffs applied for and were granted leave to intervene in said original action in mandamus, were made defendants therein, and were granted leave to and did file their answer briefs therein. The Supreme Court of Ohio, in a decision reported in 167 Ohio St., 309, rendered

February 11, 1958, rehearing denied, refused to grant said writ of mandamus on the ground and for the reason that the Attorney General of Ohio had not found and certified that said proposed amendment was in accordance with Sections 3907.01 to 3907.21, inclusive, of the Revised Code of Ohio, and not inconsistent with the Constitution and laws of the United States and of the State of Ohio.

20. Plaintiffs believe and aver that Ohio State and the individual defendants intend to and will continue their efforts to eliminate the restrictions and limitations contained in said Article V, intend to and will continue their efforts to merge Columbus Mutual into Ohio State, and intend to and will continue their plan and program to deprive Columbus Mutual's policyholders of its surplus, which belongs to said policyholders, and cause said surplus to belong to Ohio State and its stockholders.

21. Plaintiffs believe and aver that the dispute as to the ownership of the surplus of Columbus Mutual and the activities of Ohio State and the individual defendants with respect thereto, as herein set forth, have been and are prejudicing the welfare of Columbus Mutual and its policyholders, which will continue in the future, in that the result sought by Ohio State and the individual defendants, if accomplished, will reduce the security of Columbus Mutual's policyholders, will deprive them of its surplus which belongs to them, and will otherwise impair their rights as hereinafter more particularly set forth, all of which, plaintiffs believe and aver, has caused and in the future will cause loss of business, loss of profit, loss of surplus and loss of strength of Columbus Mutual.

22. In partial compliance with the requirement of said Article V that:

> "The subscriptions for such stock and the certificates of stock representing the same shall contain a provision

whereby the subscriber to and holder of such stock shall agree and assent to the provisions of this charter.",

the following statement is set forth on the face of each stock certificate of Columbus Mutual, including the certificates for the shares held by defendants herein:

"This certificate of stock is issued and accepted subject to the terms and conditions of the Articles of Incorporation of the company, to which reference is hereby made."

By purchasing said stock and accepting said stock certificates, Ohio State and the individual defendants who are stockholders of Columbus Mutual consented to be bound and are bound by all of the terms and conditions of relator's Articles of Incorporation, including said Article V, which is a contractual obligation for the benefit of Columbus Mutual's policyholders to whom its surplus belongs.

23. Pursuant to the provisions of said Article V, Columbus Mutual's paid-in surplus was returned to its stockholders in the year 1922. Columbus Mutual's directors have never acted to retire its issued and paid-up capital stock, as is contemplated and authorized by said Article V, and said directors have never taken any action to reorganize, re-incorporate, or convert said company into a pure mutual company composed of the policyholders of said company, as contemplated and authorized by said Article V. Since the year 1937, there have been in force and effect Ohio statutes providing for the mutualization of life insurance companies, Sections 9364-1, et seq., General Code, (now Sections 3913.01, et seq., Revised Code).

24. Columbus Mutual, by its name and otherwise, has held itself out to the public, to prospective policyholders,

and to its policyholders, as a mutual life insurance company, and the provisions of Article V of Columbus Mutual's articles of incorporation were in full force and effect when each and every policy now in force was issued by said company. Some, if not all, of Columbus Mutual's policyholders became such policyholders in reliance upon the provisions and limitations of said Article V and in reliance upon the representations that said company was a mutual life insurance company.

Plaintiffs believe and aver that in its annual statements, prior to 1956, filed with the Superintendent of Insurance of the State of Ohio, as required by law, which are public records, Columbus Mutual has been asked and has so answered the following question:

> Question: "Is the unassigned surplus * * * held for the stockholders or the policyholders?
>
> "Answer: Policyholders."

25. Plaintiffs believe and aver that Columbus Mutual has issued all of its life insurance policies on the level or fixed premium plan. Under this plan the maximum annual contribution which any policyholder can be called upon to pay is uniform or fixed throughout the life of his policy. In the calculation of its premium rates, Columbus Mutual has adopted one or more tables of mortality, showing the probable death rate for each age of life; it has adopted an assumed rate of interest which it might expect to realize upon its invested assets during the lifetime of each policy; it has computed premiums based thereon and has added thereto sums, known in the life insurance industry as "loading", for the purpose of conducting its business as well as any unforeseen contingencies such as an abnormal death rate due to war or pestilence. Columbus Mutual's premium rates, so calculated, have been in excess of said

company's requirements, and will continue so to be in the future on the basis of the experience of life insurance companies generally. In Columbus Mutual's experience, the actual death rate has been substantially lower than the expectancy shown in the mortality table which were assumed in calculating its premiums, and the interest rate which it has realized upon its investments has proved higher than the assumed rate. The "loading" has been greater than that required to cover the expense of conducting the business and to meet contingencies. After making due provision for a fair and adequate margin of safety each year, the excess has been added to Columbus Mutual's surplus. Said excess will continue to accumulate and constitutes and will continue to constitute Columbus Mutual's surplus which belongs to its policyholders.

26. The "unassigned surplus as of December 31, 1956" which, under said proposed amendment "shall be held and used as a special surplus for policyholders for protection of the holders of participating policies of the company which are in force on the effective date of" said amendment is stated by Columbus Mutual to be in the amount of $10,739,205.07. In addition thereto, Columbus Mutual's surplus, which belongs to its policyholders, included the following amounts as of December 31, 1957:

A voluntary reserve for employees' pensions (which relator has no contractual obligation to pay) of	$1,245,747.00
Voluntary additional policy reserves of	2,400,000.00
A voluntary general contingency reserve of	1,428,156.56
A "mandatory security valuation reserve" of	221,550.03
A voluntary investment fluctuation reserve of	1,500,000.00
	$6,795,453.59

Plaintiffs believe and aver that since December 31, 1956, Columbus Mutual has earned a net profit to date of approximately $1,650,000.00; that the directors of Columbus Mutual, elected by Ohio State by voting its stock of Columbus Mutual, have added $329,801.00 thereof to said reserve for employees' pensions, have used $250,000.00 thereof to establish a reserve for an agents' pension plan (which Columbus Mutual has no contractual obligation to pay), and have allocated from the remainder $479,139.89 to the "unassigned surplus". Plaintiffs believe and aver that the entire amount of said $1,650,000.00 is actually part of Columbus Mutual's surplus which belongs to its policyholders.

According to the annual statements of Columbus Mutual, filed with the Superintendent of Insurance of the State of Ohio, as required by law, the "unassigned surplus" of Columbus Mutual has increased by the following amounts in each of the six years last past:

	"Unassigned Surplus"	Voluntary Reserves	Total Surplus
1952	$339,428.46	$ 600,000.00	$ 939,428.46
1953	665,669.17	600,000.00	1,265,669.17
1954	590,489.18	300,000.00	890,489.18
1955	645,978.06	802,585.00	1,448,563.06
1956	890,320.82	738,561.00	1,628,882.82
1957	479,139.89	1,171,869.23	1,651,009.12

Plaintiffs believe and aver that if the plan and program of the defendants, as herein set forth, is permitted to be consummated, future increases in Columbus Mutual's surplus, which are reasonably probable, will not belong to its policyholders, as in the past and now, but will, to the extent of 99.54% thereof, belong to and all of them may be disposed of by Ohio State as the stockholder having absolute control of Columbus Mutual.

27. Columbus Mutual's assets amounted to $126,681,541.72, as of December 31, 1956, and plaintiffs believe and aver that they have increased by approximately $8,201,563.43 since that date. Except for $500,000.00 paid in by Columbus Mutual's stockholders for their stock, in 1922, and prior thereto, plaintiffs believe and aver that all of said assets have been accumulated from the premiums paid by Columbus Mutual's policyholders. Columbus Mutual's stockholders have been receiving the maximum dividends on their stock, at the rate of 10% of the par value thereof, as provided by said Article V, and said dividends have been paid out of Columbus Mutual's common earnings, to which its policyholders have contributed by their premiums as aforesaid. Plaintiffs believe and aver that if the plan and program of the defendants, as herein set forth, is permitted to be consummated, all of said assets, and the future increase thereof, will belong to Ohio State, to the extent of 99.54% thereof, subject only to the payment of Columbus Mutual's actual liabilities.

28. Comparative figures for Ohio State and Columbus Mutual as of December 31, 1957, which is the last date at which detailed figures are available to plaintiffs were, as follows:

	Ohio State	Columbus Mutual
Insurance in force	$484,955,905.77	$479,919,138.00
Total assets	88,614,777.57	134,883,105.15
Unassigned surplus	4,936,371.26	11,218,344.96
Reserve for employees pensions	none	1,245,747.00
Additional policy reserves	none	2,400,000.00
General contingent reserve	none	1,428,156.56
Security valuation reserve	136,384.56	221,550.03
Investment fluctuation reserve	none	1,500,000.00

Plaintiffs aver, on information and belief, that Columbus Mutual has certain additional assets, which, though not reflected in the corporate balance sheet, constitute a valu-

able part of the true surplus of the company, belonging to the policyholders under Article V of the Charter. One of such assets is the insurance in force, shown above, which contributes substantially to the annual increases in the surplus of the company and for which, plaintiffs believe, a purchasing insurance company would pay in excess of $10,000,000.00. Another such asset is the value of the Columbus Mutual agency organization, which, over the five-year period, ending on December 31, 1957, has produced the following amounts of business:

1953	$46,904,333
1954	50,600,365
1955	54,230,864
1956	61,868,430
1957	65,406,162

Plaintiffs believe and aver that a purchasing insurance company would pay in excess of $1,000,000 for the Columbus Mutual agency force alone. Plaintiffs allege that it is part of the plan and program of the Ohio State to take over these assets.

29. Plaintiffs believe and aver that the plan and program of Ohio State and the individual defendants, as herein set forth, constitutes misconduct and a breach of trust on their part and is in violation of their fiduciary duty to Columbus Mutual and its policyholders, because it constitutes the exercise of their absolute control of Columbus Mutual to capture and appropriate to the exclusive use of Ohio State and its directors and stockholders the surplus of Columbus Mutual which belongs to its policyholders whose premium payments on the mutual plan, as aforesaid, have created it. Plaintiffs believe and aver that said plan and program of the defendants is grossly unfair and unjust to Columbus Mutual and its policyholders, for the reasons set forth herein.

30. One principal objective of Ohio State and the individual defendants in carrying forward their plan and program, as herein set forth, is to eliminate the restrictions now contained in said Article V and thereby restore said sum of $4,805,990.00 (see paragraph 11 hereof) to the surplus of Ohio State and thus to increase the value of its stock.

31. Another principal objective of Ohio State and the individual defendants in carrying forward their plan and program as herein set forth, is to convert Columbus Mutual into a pure stock insurance company so that it may be merged into Ohio State and handle Columbus Mutual's earnings and conduct its business in conformity with the methods employed by Ohio State, the effect of which, plaintiffs believe and aver, will be to increase the net worth of Ohio State and its stock by approximately $20,000,000.00, which now belongs to Columbus Mutual's policyholders, without any compensation to them therefor. Ohio State is chartered to write insurance "on the stock plan" and its Amended Articles and Charter confer no rights or privileges whatsover on its policyholders and impose no restrictions or limitations of any kind or character on its stock or stockholders.

32. Plaintiffs believe and aver that the proposed amendment to Columbus Mutual's articles of incorporation (see paragraph 16, hereof), the proposed merger of Columbus Mutual into Ohio State on the basis proposed by the defendants, and the threatened capture and appropriation of Columbus Mutual's surplus and its conversion into property of Ohio State and its stockholders, as herein set forth, are in violation of Article I, Section 10, and the Fifth and Fourteenth Amendments of the Constitution of the United States of America, and Article I, Sections 1 and 19, and Article II, Section 28, of the Constitution of

Ohio, and are unlawful, unfair, inequitable, and violative of the rights of Columbus Mutual's policyholders in the following particulars, to-wit:

(a) The surplus of Columbus Mutual now belong to its policyholders, subject only to the limited rights of its stockholders to receive dividends equal to 10% on the par value ($100) of their stock, and to receive $200 per share for their stock upon its retirement. Said proposals will deprive Columbus Mutual's policyholders of that which now belongs to them, without compensation therefor and without due process of law.

(b) No statute of the State of Ohio permits the adoption of said proposed amendment.

(c) If Section 1701.69, Ohio Revised Code, or any other Ohio statute, can be interpreted to permit a domestic life insurance company to amend its articles of incorporation, which plaintiffs deny, then said statute, as applied to the proposed amendment of said Article V, is a law impairing the obligation of contracts and violates Article I, Section 10, of the Constitution of the United States of America, and Article II, Section 28, of the Constitution of Ohio.

(d) Said plan, program and proposals, if consummated, will deprive the policyholders of Columbus Mutual of their property without due process of law and without just compensation therefor, in violation of Article I, Sections 16 and 19, of the Constitution of Ohio.

(e) If any statute of the State of Ohio can be interpreted to permit said plan, program and proposals to be consummated, which plaintiffs deny, then such statute is violative of the Fourteenth Amendment of the Constitution of the United States of America which provides that no state shall deprive any person of property without due process of law, because the surplus of Columbus Mutual, which belongs to its policyholders, will be taken away

articles of incorporation, including Article V thereof as it now exists.

(q) The proposed amendment will destroy the mandatory provisions of said Article V that Columbus Mutual's surplus shall be apportioned and distributed to its policyholders.

(r) The proposed amendment, as a preliminary step in the plan and program of Ohio State to vote its 99.54% of Columbus Mutual's stock so as to merge said company into Ohio State, is unlawful, inequitable and unconstitutional because:

(1) Such proceedings will violate the rights of Columbus Mutual's policyholders to have it converted into a pure mutual company composed of its policyholders;

(2) The adoption of the proposed amendment in advance and in anticipation of the commencement of the merger proceedings will prevent the merger commission, prescribed by Section 3907.11, Revised Code, from protecting the interests of Columbus Mutual's policyholders with respect to the surplus that belongs to them under existing Article V of its articles of incorporation;

(3) The adoption of the proposed amendment in advance and in anticipation of the commencement of merger proceedings is not authorized by any statute;

(4) The adoption of the proposed amendment in advance and in anticipation of the commencement of merger proceedings is an attempt to evade the safeguards for Columbus Mutual's policyholders provided by Section 3907.11, Revised Code;

(5) The carrying out of the plan and program of merger will prevent the distribution of Columbus Mutual's surplus to its policyholders, but instead will convert such surplus into the property of Ohio State and its stockholders;

(6) Said merger will result in the dissolution of Columbus Mutual, but, under the proposed amendment, the surplus of Columbus Mutual will not be distributed to its policyholders because said amendment provides for only limited distribution and that only in the event of both dissolution and liquidation of said company.

(s) Under the proposed amendment, in the event of both the dissolution and liquidation of Columbus Mutual, those of the present policyholders whose policies are then in force will receive only some indefinite and undefined percentage interest in only the so-called "special surplus" created by said amendment; and all of the remaining "special surplus" and all of the other assets of Columbus Mutual, after the payment or securing of its obligations, will be distributed to the stockholders, which means that the stockholders will be unjustly enriched by receiving property which now belongs to policyholders.

(t) Under the proposed amendment, in the event of both the dissolution and liquidation of Columbus Mutual after the policies of its present policyholders are no longer in force, all of the surplus of Columbus Mutual will be distributed to its stockholders, which means that the stockholders will be unjustly enriched by receiving property which now belongs to the policyholders of Columbus Mutual.

(u) A result of the proposed amendment will be to convert a mutual or quasi-mutual life insurance company into a pure stock company without the knowledge or acquiescence of its policyholders whose vested property rights are prejudiced by such conversion, and without any authority in law so to do.

(v) Under the proposed amendment, there is no limit as to the amount that Columbus Mutual's directors, elected by Ohio State, may pay to Ohio State and Columbus Mutual's other stockholders upon the retirement or redemption of

any or all of the shares of stock held by them or any of them, and said amendment does not prohibit the use of the so-called "surplus surplus" for the retirement or redemption of any or all of said stock at any time or in any amount.

(w) The plan, program and proposals of the defendants, as above set forth, are in violation of the ultimate objective, spelled out in said Article V, that Columbus Mutual shall be a mutual insurance company composed of its policyholders, and, if consummated, will defeat the end for which said company was established.

33. Columbus Mutual and its policyholders will be greatly and irreparably damaged if the proposed plan, program and proposals of the defendants, or any part thereof, are consummated, and they have no adequate remedy at law.

WHEREFORE, plaintiffs, in behalf of themselves and of all policyholders similarly situated and in behalf of Columbus Mutual, pray:

(1) That this Court render its judgment herein declaring, as follows:

(a) That the surplus of Columbus Mutual belongs to its mutual plan policyholders, subject only to the limited rights of its stockholders to receive dividends equal to 10% on the par value ($100.00 per share) of their stock and to receive $200.00 per share for their stock upon its retirement.

(b) That no statute of the State of Ohio permits the adoption of the proposed amendment to Columbus Mutual's charter.

(c) That if Section 1707.69, Revised Code, or any other Ohio statute were interpreted to permit Columbus Mutual to adopt the proposed amendment to its charter, then said statute is a law impairing the obligation of contracts and violates Article I, Section 10, of the Constitution of the United States of America, and Article II, Section 28, of the Constitution of Ohio.

(d) That if any statute of the State of Ohio were interpreted to permit the aforesaid plan, program and proposals of the defendants to be consummated, such statute is in violation of the Fourteenth Amendment of the Constitution of the United States of America.

(e) That the aforesaid plan, program and proposals, of the defendants are in violation of Article I, Section 1, of the Constitution of Ohio.

(f) That the aforesaid plan, program and proposals of the defendants are in violation of Article I, Sections 16 and 19 of the Constitution of Ohio.

(g) That Ohio State and the individual defendants who are stockholders of Columbus Mutual stand in a fiduciary relationship to Columbus Mutual and its policyholders and cannot exercise their voting power so as to increase the value of their stock by relieving it of the restrictions and limitations of said Article V, to which they consented and by which they agreed to be bound when they acquired said stock.

(h) That the defendants are estopped to violate the ownership of Columbus Mutual's surplus by its mutual plan policyholders.

(i) That Columbus Mutual's surplus, as that term is used in said Article V, consists of all assets of Columbus Mutual, and the increase thereof, less only so much thereof as is actually needed to pay its liabilities as they accrue.

(j) That the proposed amendment of Columbus Mutual's charter will serve no valid business purpose of Columbus Mutual.

(k) That the aforesaid plan, program and proposals of the defendants are in breach of the express contractual undertaking of the Ohio State and the individual defendants who are stockholders of Columbus Mutual to be bound by the terms and conditions of Columbus Mutual's present

articles of incorporation, including said Article V as it now exists.

(l) That said Article V mandatorily requires that Columbus Mutual's surplus shall be apportioned and distributed to its mutual plan policyholders, and that said proposed amendment would destroy said mandatory requirement.

(m) That said proposed amendment, as a preliminary step in the plan and program of Ohio State to vote its 99.54% of Columbus Mutual's stock so as to merge said company into Ohio State, is unlawful, inequitable and unconstitutional because:

(1) Such proceedings will violate the rights of Columbus Mutual's policyholders to have it converted into a pure mutual company composed of its policyholders;

(2) The adoption of the proposed amendment in advance and in anticipation of the commencement of the merger proceedings will prevent the merger commission, prescribed by Section 3907.11, Revised Code, from protecting the interests of Columbus Mutual's policyholders with respect to the surplus that belongs to them under existing Article V of its articles of incorporation;

(3) The adoption of the proposed amendment in advance and in anticipation of the commencement of merger proceedings is not authorized by any statute;

(4) The adoption of the proposed amendment in advance and in anticipation of the commencement of merger proceedings is an attempt to evade the safeguards for Columbus Mutual's policyholders provided by Section 3907.11, Revised Code.

(5) The carrying out of the plan and program of merger will prevent the distribution of Columbus Mutual's surplus to its policyholders, but instead will convert such surplus into the property of Ohio State and its stockholders;

(6) Said merger will result in the dissolution of Columbus Mutual, but, under the proposed amendment, the surplus of Columbus Mutual will not be distributed to its policyholders because said amendment provides for only limited distribution and that only in the event of both dissolution and liquidation of said company.

(n) That under the proposed amendment Columbus Mutual would be converted into a pure stock insurance company without the knowledge or acquiescence of its policyholders which would prejudice their vested property rights.

(o) That said proposed amendment does not prohibit the use of the so-called "special surplus" for the retirement or redemption of any or all of Columbus Mutual's stock at any time for any amount.

(p) That the provisions of said Article V establish that Columbus Mutual is ultimately to be a mutual insurance company composed of its policyholders and without any stockholders, and that said result will be defeated if the proposed amendment becomes effective.

(q) That the directors or stockholders of Columbus Mutual have no power to merge it into any other insurance company or otherwise change or vary its present corporate structure until, first, its stock has been redeemed as provided for in said Article V, and, second, said company has been mutualized in the manner provided by law.

(r) That this Court declare that it is impossible to merge Columbus Mutual into Ohio State without destroying the rights of Columbus Mutual's policyholders. In the alternative, if the Court find that a merger would be lawful and possible, that the Court make an order requiring that in any such a merger the assets and liabilities of Columbus Mutual be segregated and separately administered in the sole and exclusive interest of Columbus Mutual's policy-

holders, subject only to the limited rights now conferred upon Columbus Mutual's stockholders by said Article V, and that from time to time in the course of such administration there be apportioned and distributed to Columbus Mutual's policyholders whatever amounts of Columbus Mutual's then existing surplus are not reasonably required for the security of said policyholders, to the end that when the last of Columbus Mutual's policies shall have matured and been paid, all of the surplus of Columbus Mutual and its accretion will have been apportioned and distributed to Columbus Mutual's policyholders.

2. That this Court grant to the plaintiffs such other and further relief as to the Court may seem just and proper in the premises and so as to make effective the declaratory judgment rendered in this cause, together with plaintiffs' costs and disbursements, including reasonable attorneys' fees, and that the defendant, Columbus Mutual, or the defendant, Ohio State, or both, be required to pay the same.

Edward B. Raub, Jr.,
William A. Wick,
Richard L. Miller,
Wm. E. Knepper,
Attorneys for Plaintiffs.

Of Counsel:
White, Raub & Forrey,
Knepper, White, Richards, Millere & Roberts.

[Duly verified.]

ANSWER AND COUNTER CLAIM

[Filed March 28, 1958.]

For answer to the amended complaint of plaintiffs in the above entitled cause, defendants above named say

1. Defendants admit the allegations contained in the first paragraph of the amended complaint.

2. Defendants admit the allegations contained in the second paragraph of the amended complaint.

3. Defendants admit the allegations contained in the third paragraph of the amended complaint.

4. Defendants admit the allegations contained in the fourth paragraph of the amended complaint.

5. Defendants admit the allegations contained in the fifth paragraph of the amended complaint.

6. Defendants admit the allegations contained in the sixth paragraph of the amended complaint.

7. Defendants admit the allegations contained in the seventh paragraph of the amended complaint.

8. Defendants admit the allegations contained in the eighth paragraph of the amended complaint.

9. Defendants deny that, by virtue of the present provisions of Article V of its articles of incorporation the surplus of defendant, The Columbus Mutual Life Insurance Company belongs to the holders of its participating policies or policies on the mutual plan. Defendants admit that under the present provisions of such Article V dividends on the common stock of defendant, The Columbus Mutual Insurance Company, are limited to 10% and that in the event of the conversion of said company from a stock company to a mutual company, the amount at which its stock may be redeemed or retired is $200.00 per share. Defendants deny that plaintiffs and the policyholders in whose behalf they bring this action are legally the owners of Columbus Mutual and deny that they are the equitable and beneficial owners of said company; but say that such ownership lies exclusively in its stockholders. Defendants deny that they have taken any action or carried on any activity for the purpose or objective of taking anything whatever away from its policyholders which belongs to them, or exercising Ohio State's voting control of Columbus Mutual's stock so to do.

10. Defendants admit the allegations contained in the tenth paragraph of the amended complaint.

11. Defendants admit the allegations contained in the eleventh paragraph of the amended complaint, except the allegation that the effect of the action of The National Association of Insurance Commissioners determining the value at which Columbus Mutual stock should be carried on the books of Ohio State has been to reduce the surplus of Ohio State by $4,805,990.00, which allegation defendants deny.

12. Defendants admit the allegations contained in the twelfth paragraph of the amended complaint.

13. Defendants admit the allegations contained in the thirteenth paragraph of the amended complaint.

14. Defendants admit the allegations contained in the fourteenth paragraph of the amended complaint.

15. Defendants admit the allegations contained in the fifteenth paragraph of the amended complaint.

16. Defendants admit the allegations contained in the sixteenth paragraph of the amended complaint.

17. Defendants admit the allegations contained in the seventeenth paragraph of the amended complaint.

18. Defendants deny the allegations contained in the eighteenth paragraph of the amended complaint.

19. Defendants admit the allegations contained in the nineteenth paragraph of the amended complaint.

20. Defendants admit the allegations contained in the twentieth paragraph of the amended complaint, except that defendants deny that the surplus of Columbus Mutual belongs to its policyholders and say that said surplus belongs to its stockholders.

21. Defendants deny the allegations contained in the twenty-first paragraph of the amended complaint.

22. Defendants admit the requirements of Article V of its articles of incorporation and the compliance therewith, in the issuance of its outstanding stock, but deny that the statements as set forth on the face of the outstanding stock certificates in any way constitute evidence of any contractual obligation for the benefit of any policyholders of Columbus Mutal, and deny that the surplus of Columbus Mutual belongs to any of its policyholders.

23. Defendants admit the allegations contained in the twenty-third paragraph of the amended complaint.

24. With reference to the allegations contained in paragraph twenty-four of plaintiff's amended complaint, defendants admit that the word "mutual" appears in the name of Columbus Mutual and deny that Columbus Mutual has ever held itself out to the public, to prospective policyholders, or to its policyholders as a mutual life insurance company. Defendants admit that Article V of Columbus Mutual's articles of incorporation were in full force and effect when each and every policy now in force was issued by said company. Defendants admit that in its annual statements, prior to 1956, filed with the Superintendent of Insurance of the State of Ohio, Columbus Mutual has been asked and has so answered the question set forth in paragraph 24 of said amended complaint. Defendants further state that they have no knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in paragraph twenty-four of the amended complaint.

25. Defendants admit the allegations contained in the twenty-fifth paragraph of the amended complaint, except the allegation that Columbus Mutual's surplus belongs to its policyholders, which allegation defendants deny.

26. Defendants admit the allegations contained in the twenty-sixth paragraph of the amended petition, except the

allegations with respect to reserves which Columbus Mutual carries on its books as constituting part of its surplus, which defendants deny and say that such reserves are properly carried on its books with the approval of the Superintendent of Insurance of Ohio for the protection and benefit of all of its policyholders, and defendants deny that any of said company's surplus belongs to its policyholders.

27. Defendants admit the allegations contained in paragraph twenty-seven of the amended complaint, except the allegation that all of the assets of Columbus Mutual in excess of $500,000 paid-in capital have been accumulated from the premiums paid by Columbus Mutual's policyholders, which allegation defendants deny; and defendants say that a substantial portion of said assets have been derived not from the premiums paid by policyholders, but from earnings upon investments made under the direction of the directors of Columbus Mutual who are elected by its shareholders and not by its policyholders. Defendants further deny the allegation contained in paragraph twenty-seven of the amended complaint to the effect that 99.54% of the assets of Columbus Mutual will belong to Ohio State if the plan and program of defendants, as therein set forth, is consummated, and say that whatever interest Ohio State may have in the assets of Columbus Mutual either before or after the merger of the two companies, that interest will be subject to and limited by the express provisions of the proposed amendment to Article V of the articles of Columbus Mutual, and to the actual liabilities of said company.

28. Defendants admit the allegations contained in paragraph twenty-eight of the amended complaint, except the allegation that the true surplus of Columbus Mutual belongs to the policyholders, which allegation defendants deny.

29. Defendants deny the allegations contained in the twenty-ninth paragraph of the amended complaint.

30. Defendants admit that their plan and program is to amend the provisions of Article V of the articles of incorporation of Columbus Mutual, but deny the other allegations contained in paragraph thirty of the amended complaint.

31. Defendants admit the allegations contained in the thirty-first paragraph of the amended complaint to the effect that the purpose of the amendment of said Article V is to conform the corporate structure of Columbus Mutual with that of Ohio State to facilitate merger of the two companies, but deny that the effect of such amendment will be to increase the net worth of Ohio State and deny that Columbus Mutual belongs to its policyholders, and also deny that the objective of defendants is to convert Columbus Mutual into a pure stock company, for the reason that Columbus Mutual is now and always has been a stock company.

32. Defendants deny the allegations contained in the first paragraph of the thirty-second numbered paragraph of the amended complaint.

(a) Defendants deny the allegations contained in paragraph 32 (a) of the amended complaint.

(b) Defendants deny the llegations contained in paragraph 32 (b) of the amended complaint.

(c) Defendants deny the allegations contained in paragraph 32 (c) of the amended complaint.

(d) Defendants deny the allegations contained in paragraph 32 (d) of the amended complaint.

(e) Defendants deny the allegations contained in paragraph 32 (e) of the amended complaint.

(f) Defendants deny the allegations contained in paragraph 32 (f) of the amended complaint.

(g) Defendants deny the allegations contained in paragraph 32 (g) of the amended complaint.

(h) Defendants deny the allegations contained in paragraph 32 (h) of the amended complaint.

(i) Defendants deny the allegations contained in paragraph 32 (i) of the amended complaint.

(j) Defendants deny the allegations contained in paragraph 32 (j) of the amended complaint, and say that the surplus of Columbus Mutual belongs to its stockholders and has always belonged to its stockholders.

(k) Defendants deny the allegations contained in paragraph 32 (k) of the amended complaint.

(l) Defendants deny that the surplus of the company has ever belonged to its policyholders and say that they have no knowledge or information sufficient to form a belief as to any future surplus of the company, or as to any future profits or losses arising from the conduct of its business, and further say that defendants are not now and never have been under any legal obligation to create or maintain a surplus, and say further that the policyholders will have no interest in any future surplus which might be maintained or earned other than that which they now have in the present surplus; to-wit, the right to receive dividends therefrom as declared by the directors.

(m) Defendants deny the allegations contained in paragraph 32 (m) of the amended complaint for the reason that the policyholders do not now own the assets of the company.

(n) Defendants deny the allegations contained in paragraph 32 (n) of the amended complaint.

(o) Defendants deny the allegations contained in paragraph 32 (o) of the amended complaint.

(p) Defendants deny the allegations contained in paragraph 32 (p) of the amended complaint.

(q) Defendants deny the allegations contained in paragraph 32 (q) of the amended complaint.

(r) Defendants deny the allegations contained in paragraph 32 (r) of the amended complaint.

(s) Defendants admit the allegations contained in paragraph 32 (s) of the amended complaint, except the allegation that the stockholders will be unjustly enriched in the event of both the dissolution and liquidation of Columbus Mutual and the allegation that such property now belongs to the policyholders which allegations defendants deny.

(t) Defendants admit the allegations contained in paragraph 32 (t) of the amended complaint, except the allegation that the stockholders will be unjustly enriched in the event of both dissolution and liquidation of the Columbus Mutual, which defendants deny.

(u) Defendants deny the allegations contained in paragraph 32 (u) of the amended complaint.

(v) Defendants admit the allegations contained in paragraph 32 (v) of the amended complaint, except the allegation that the amendment does not prohibit the use of the so-called "special surplus" for retirement or redemption of any of its stock, which allegation defendants deny.

(w) Defendants deny the allegations contained in paragraph 32 (w) of the amended complaint.

33. Defendants deny the allegations contained in the thirty-third paragraph of the amended complaint.

Defenses

34. For a first, separate and distinct defense, defendants allege that each and every policy of insurance issued by Columbus Mutual from the date of its incorporation to January 1, 1909, contained the following statement:

> "This policy constitutes the entire contract between the parties and shall be incontestable from its date except for non-payment of premiums and except as otherwise provided in this policy."

and each and every policy of insurance issued by the Columbus Mutual on and subsequent to January 1, 1909, to date, contained the following statement as required by law:

"This policy and the application therefor, a copy of which is attached to and made part hereof, constitute the entire contract between the parties."

35. For a second, separate and distinct defense, defendants allege that beginning in the year 1908, when Columbus Mutual's first policy was issued, to the present time, it issued, and is still issuing, participating policies of life insurance providing for policyholder participation in the surplus of the company which participation clauses in its policies have over the years hereinafter designated provided as follows:

1909-1911 "Participation. This policy shall participate in the surplus of the Company, and beginning not later than the end of the first policy year the Company will annually determine and account for the portion of the dividible surplus accruing hereon."

1911-1914 "Participation. This policy shall participate in the surplus of the Company, and beginning not later than the end of the second policy year the Company will annually determine and account for the portion of the divisible surplus accruing hereon."

1914-1918 "Participation. This policy shall participate in the surplus of the Company, and beginning not later than the end of the second policy year the Company will annually determine and account for the portion of the divisible surplus accruing hereon."

1918-1948 "Dividends. This policy shares annually in the profits of the Company, as follows: The proportion of divisible surplus accruing on this policy shall be determined annually commencing with the first year. Upon payment of premiums for the second and third years, and upon each anniversary thereafter, such surplus as shall have been apportioned by the Company to this policy shall at the option of the beneficiary be either * * * (here follows options as to each payment's application toward payment of premiums, etc.)"

1948-1958 "Annual Participation. This policy shares in the divisible surplus at the end of each policy year as apportioned by the Company, but payment of the first and second dividends shall be contingent upon payment of the premium for the second and third policy years, respectively."

Defendants say that the foregoing clauses contained in Columbus Mutual's participating policies constitutes the sole reference in such policies to the surplus of the Company and that no policy of life insurance ever issued by Columbus Mutual has ever contained any reference to Article V of its Articles of Incorporation or to any of the provisions thereof.

36. For a separate and distinct defense arising upon the face of the amended complaint herein, defendants say that the facts alleged in said amended complaint are insufficient to state a claim upon which relief can be granted for the following reasons:

(a) Columbus Mutual having been incorporated under the laws of Ohio as a stock life insurance company in 1906 as alleged in the amended complaint, has never seen fit to convert or reorganize as a mutual life insurance company, under the mutualization statutes first enacted in 1937, and as an Ohio stock company, under Ohio law the entire ownership of the company, including its surplus, the entire voting rights, management and control of the corporation has been, since its incorporation and still is, exclusively vested in its stockholders.

(b) Under Article XIII, Section 2 of the Ohio Constitution as adopted in 1851 and still in full force and effect, Columbus Mutual has the constitutional right, through its directors and stockholders, to amend its charter as provided by resolution of its stockholders of October 28, 1957, set forth in paragraph sixteen of the amended complaint.

(c) The restrictions of Article V of the articles of incorporation of Columbus Mutual pertaining to stockholder dividends neither create nor confer any rights in or upon policyholders, and said restrictions may be freely amended by the stockholders under the Constitution and laws of Ohio.

(d) The provisions of said Article V for retiring the stock at $200.00 per share neither creates nor confers any rights in or upon policyholders, and said provision may be freely amended by the stockholders under the Constitution and laws of Ohio.

(e) The provision of said Article V that the surplus of the company "shall belong to holders of policies on the mutual plan" relates only to the rights of policyholders in and to the company's surplus after the retirement of all of the company's stock and after the mutualization of said company. Article V imposes no duty nor obligation upon the directors to retire said stock or to mutualize the company prior to the retirement of said stock; rather the retirement of stock is within the sole discretion of the directors and consequently unless and until said directors in their sole discretion, retire said stock and mutualize said company, the policyholders have no right, title or interest in or to said surplus other than such portion thereof as may be apportioned to their policies by the directors in their sole discretion, and the provision may be freely amended by the shareholders under the Constitution and laws of Ohio.

(f) So-called mixed or half stock and half mutual life insurance companies are unknown in Ohio and such corporate structures were neither authorized nor recognized by Ohio law at the time Columbus Mutual was incorporated, nor have they been since.

(g) The complaint discloses on its face that this action is an effort on the part of the participating policyholders of

Columbus Mutual, who have invested no capital in this business, who have had nothing to do with its management and conduct, and who have no ownership or interest in the company other than set forth in their contracts of insurance, to capture and convert unto themselves ownership of this company from its stockholders—stockholders who have invested their capital in this business, who have been solely responsible for its management and success, and who own it. There is no allegation in the amended complaint, nor could there be, that there has been any mismanagement or default on the part of this company's directors in constantly providing for its policyholders the protection and security called for by their policies, which is all the policyholders contracted for.

Counter Claim

Wherefore, defendants pray—

(1) That this court render its judgment herein declaring as follows:

(a) That the surplus of Columbus Mutual belongs to its stockholders and that the policyholders of Columbus Mutual, by virtue of the express provisions of their respective contracts of insurance with said company and the laws of the State of Ohio, have no right, title or interest in or to said surplus except for such portion of said surplus as the directors of Columbus Mutual, in their sole discretion, may apportion to said policyholders in the form of policy dividends.

(b) That the proposed amendment to Article V of the articles of incorporation of Columbus Mutual, as adopted by its stockholders on October 28, 1957, is a lawful amendment, authorized by Section 1701.69 of the Revised Code of Ohio.

(c) That said proposed amendment to Article V of the articles of incorporation of Columbus Mutual, as adopted

by its stockholders on October 28, 1957, is in accordance with the laws and Constitution of the United States and of the State of Ohio.

(d) That in authorizing said proposed amendment of Columbus Mutual's articles of incorporation, Section 1701.69, Revised Code, impairs no obligation of contracts and does not violate Article I, Section 10, of the Constitution of the United States, nor Article II, Section 28, of the Constitution of Ohio.

(e) That in authorizing said proposed amendment to the articles of incorporation of Columbus Mutual such Section 1701.69 is not in violation of the XIV Amendment of the Constitution of the United States.

(f) That no program, plan or proposal of defendants are in violation of Article I, Section 1 of the Constitution of Ohio.

(g) That no program, plan or proposal of defendants are in violation of Article I, Sections 16 and 19 of the Constitution of Ohio.

(h) That the stockholders of Columbus Mutual have full power and authority to amend said Article V as aforesaid.

(i) That the holders of participating policies or policies on the mutual plan of Columbus Mutual are estopped by the express terms of their insurance contracts as set forth in their policies to claim any ownership in the surplus of Columbus Mutual, other than such portion of said surplus as has, or may in the future be, apportioned to said policyholders by the director of Columbus Mutual.

(j) That the stockholders of Columbus Mutual have a legal right to amend Article V of the articles of incorporation of said company under the Constitution and laws of Ohio.

(k) That the rights of participating policyholders with respect to apportionment and distribution of the surplus of

Columbus Mutual are expressly and exclusively set forth in their respective participating policies.

(l) That Article V of the articles of incorporation of Columbus Mutual neither creates nor confers any vested rights of property or contract in or upon the policyholders of said company.

(m) That the proposed amendment as a preliminary step toward possible eventual merger of Columbus Mutual and Ohio State is lawful and constitutional because:

(1) Columbus Mutual policyholders have no right under the law to have it converted into a mutual company composed of its policyholders since such action is solely in the first instance under the law in the discretion of its board of directors, who are under the law elected by its stockholders and not its policyholders.

(2) The adoption of the proposed amendment will not in any way prevent the merger commission prescribed by Section 3907.11, Revised Code, from protecting the interests of Columbus Mutual's policyholders.

(3) The adoption of the proposed amendment is authorized by law regardless of whether or not subsequent contemplated merger proceedings may be instituted and consummated.

(4) The adoption of the proposed amendment in anticipation of the commencement of merger proceedings will safeguard the interests of Columbus Mutual's participating policyholders as provided by Section 3907.11, Revised Code, because it provides greater future protection to such policyholders than they presently enjoy.

(5) The carrying out of the plan and program of merger will in no way effect distribution of surplus of Columbus Mutual's policyholders to which they are entitled in the form of dividends, but will further secure and protect such distributive rights.

(n) The proposed amendment has no effect on any vested property or contract rights of Columbus Mutual's policyholders and such policyholders have no statutory right to vote on the question of amending the company's articles of incorporation.

(o) The "special surplus" provided for in the proposed amendment may not be used for retirement of any stock.

(p) Article V of the articles of incorporation of Columbus Mutual impose no mandatory duty or obligation upon either the directors or the stockholders to mutualize the company, such conversion being purely a discretionary matter under the articles and the law of Ohio.

(q) The director and stockholders of Columbus Mutual have full constitutional authority to amend the company's articles and full statutory authority to merge the company with Ohio State.

2. That this court deny the prayer of plaintiffs as set forth in their amended complaint.

3. That this court grant to the defendants such other and further relief as to the court may seem just and proper in the premises and so as to make effective the declaratory judgment rendered in this cause, together with defendants' costs and disbursements, and that plaintiffs be required to pay the same.

William S. Evatt,
Robert L. Barton,
William R. Chadeayne,
Donald J. Hoskins, Vice President and General Counsel,
The Columbus Mutual Life Insurance Company,
Attorneys for Defendants.

Of Counsel:
Bricker, Marburger, Evatt & Barton.

[Duly verified.]

REPLY

[Filed March 31, 1958.]

For their reply to the answer and counterclaim of the defendants, the plaintiffs:

1. Admit the allegations contained in the thirty-fourth paragraph of the answer and counterclaim;

2. Admit the allegations contained in the thirty-fifth paragraph of the answer and counterclaim;

3. Deny, each and every, all and singular, the allegations contained in the thirty-sixth paragraph of the answer and counterclaim and in subparagraphs 36 (a) through 36 (g), both inclusive thereof, and each of them;

4. Deny, each and every, all and singular, the statements contained in said answer and counterclaim, save and except such as are herein expressly admitted to be true.

Wherefore, plaintiffs renew the prayer of their amended complaint.

Edward B. Raub, Jr.,
William A. Wick,
Richard L. Miller,
Wm. E. Knepper,
Attorneys for Plaintiffs.

Of Counsel:
White, Raub & Forrey,
Knepper, White, Richards, Miller & Roberts.

[Duly verified.]

AMENDMENT OF ANSWER

[Filed March 31, 1958.]

Defendants, as of course, in accordance with Rule 15 (a) of the Federal Rules of Civil Procedure, amend their answer in the above entitled cause and strike all of paragraph 24, page 3, thereof, and insert in place therefor the words:

"24. With reference to allegations contained in paragraph twenty-four of the Amended Complaint, defendants admit that the word 'Mutual' appears in the name of the Columbus Mutual but deny that Columbus Mutual, through its officers, directors or management, has ever held itself out to the public, to prospective policyholders, or to its policyholders as a mutual company. Defendants admit that Article V of the Columbus Mutual's articles of incorporation was in full force and effect when each and every policy now in force was issued by said company. Defendants admit that in its annual statements, prior to 1956, filed with the Superintendent of Insurance of the State of Ohio, Columbus Mutual has been asked and has so answered the question set forth in paragraph twenty-four of the Amended Complaint. Defendants further admit that some of Columbus Mutual's policyholders may have become such policyholders in reliance upon the provisions and limitations of Article V and in reliance upon the representations that said company was a mutual life insurance company."

Dated, March 31, 1958.

William E. Evatt,
Attorneys for Defendants.

[Duly verified.]